NO. 21770

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANNON THRASHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
THEODORE E. ORLISS,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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STATEMENT OF JURISDICTION

On September 29, 1966, a six-count indictment was filed in the United States District Court for the Southern District of California, Central Division, charging as follows [C. T. 2-7, 21, 34]: [1]

Counts One, Two and Three charged appellant and co-defendant Mittleman with the concealment and sale of 4279.20 grams of marihuana;

Counts Four and Five charged appellant and co-defendants Getchel and Lange with the concealment of 27,563.40 grams of

---

[1] "C. T." refers to Clerk's Transcript of Record.

marihuana;

Count Six charged appellant with the concealment of 10.46 grams of marihuana [C. T. 2-7].

The District Court had jurisdiction under 18 U. S. C. §3231, 21 U. S. C. §176a, 26 U. S. C. §§ 4742(a), 7237 and Federal Rules of Criminal Procedure, Rule 18.

This Court has jurisdiction under Title 28, United States Code, §§ 1291 and 1294.

Defendant Mittleman's trial was severed [C. T. 22].

Appellant waived trial by jury and special findings of fact, and the court, the Honorable A. Andrew Hauk, tried appellant and co-defendants Lange and Getchel on November 28, 29 and 30, 1966 [C. T. 21-24; R. T. 7, 9, 10, 173-179]. [2/]

On November 30, 1966, the court found appellant guilty on Counts One, Two Three and Four, and not guilty on Counts Five and Six. Co-defendants Lange and Getchel were found guilty on Count Four and not guilty on Count Five [C. T. 24; R. T. 336-337, 357, 355-356, 334, 336].

On February 14, 1967 appellant was sentenced to serve five years concurrently on Counts One, Two, Three and Four [C. T. 34].

On March 1, 1967, notice of appeal was filed by appellant Thrasher [C. T. 46].

[2/] "R. T." refers to Reporter's Transcript.

ISSUE PRESENTED

The only issue on this appeal is whether the evidence is sufficient to sustain the Court's finding that no entrapment of appellant Thrasher occurred.

STATEMENT OF THE CASE [3]

Four witnesses testified [R. T. Vol. 1, Master Index]. The United States called Herbert A. Emrod, a narcotics agent employed by the United States Treasury Department, and Sergio Barquez, who was similarly employed, before it rested [R. T. 22, 143-144, 184]. Appellant called Clay Lockett, who worked as an irregular special employee for the Bureau of Narcotics, as an adverse witness, and also called Charlotte Ann Spragens, who lived with appellant during the period involved in the trial [R. T. 236-239, 299-300]. Emrod was called in rebuttal [R. T. 322]. All parties rested, and appellant Thrasher did not testify [R. T. 321, 323-324].

On May 4, 1966, appellant, at his request, met with Agent Emrod of the Federal Bureau of Narcotics, who was posing as a buyer, and discussed selling him 100 kilos of marihuana. Appellant indicated that he had a specific source of marihuana [R. T. 25-26,

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[3] While the directly conflicting testimony is cited in this statement, the narrative itself is written under the well settled rules that on appeal the evidence must be approached in the light most favorable to the prevailing party, and that facts found at trial on conflicting testimony will not be disturbed on appeal.

80-82, 84, 252]. Thrasher gave Emrod a phone number which Emrod subsequently used to call him [R. T. 87].

Between May 4, 1966 and June 5, 1966, Agent Emrod and appellant Thrasher had a total of six phone conversations in which they negotiated over the hundred kilo sale. Appellant called Emrod four times [R. T. 26-27, 85-87].

During this period between May 4, 1966 and the first sale on June 8, 1966, appellant Thrasher met repeatedly with Clay Lockett at Lockett's home, at appellant's home and at a Hollywood coffee house. Appellant Thrasher and Charlotte Spragens were smoking marihuana in Lockett's company and at other times [R. T. 258, 262-263, 283, 284, 290, 308-311]. The meetings were sporadic and involved discussions of many things including marihuana and Thrasher's need for money for his inventions [R. T. 247, 257-259]. Soon after May 4, 1966, appellant told Lockett that the one hundred kilo deal had fallen through, and that he, Thrasher, couldn't handle the one hundred kilo sale; that it was too big a hassle [R. T. 252-254]. However he never told this to Agent Emrod [R. T. 85].

This conversation, regarding Thrasher's difficulties in putting together the hundred kilo sale, was never specifically dated. However, it must have taken place after the May 4, 1966 meeting with Emrod, and the testimony placed it long before appellant Thrasher went to jail on a traffic ticket [R. T. 253-254]. This jailing, and his subsequent release, occurred before appellant Thrasher received Agent Emrod's phone number from Lockett, which probably took place shortly before June 5, 1966 [R. T. 85-86, 93-94, 255].

Lockett's instructions from the Federal Bureau of Narcotics were to remain in contact with appellant Thrasher to see if appellant wanted to make a sale, but not to persuade him to sell. Lockett did not devote excessive attention to Thrasher and both Lockett and Thrasher initiated their meetings and contacts [R. T. 258-261, 263]. Appellant Thrasher was the person who several times introduced the subjects of marihuana and the sale thereof to Emrod. Lockett served as a message carrier between Emrod and Thrasher [R. T. 91-92, 255, 264-266, 282-283].

About this time, Thrasher was arrested on the traffic charge and he was having financial problems. Around this time Lockett took him to coffee or dinner, once or twice, and lent him small amounts of money. When Thrasher was released from jail he visited Lockett and used Lockett's place to clean up [R. T. 266-268]. Near the end of May, 1966, Lockett, at Agent Emrod's instructions, delivered Emrod's telephone number to appellant Thrasher [R. T. 255, 269]. Thereafter, Thrasher made several calls to Emrod [R. T. 26-27, 85-87].

On June 5, 1966, Thrasher called Agent Emrod and said that, while the one hundred kilos were not yet available, he had ten kilos for sale at $125 per kilo. On June 7, 1966, Thrasher and Emrod met by appointment in Hollywood [R. T. 29-36, 87, 91, 94, 95]. Another person was there with Thrasher [R. T. 31, 32]. The three of them went to a parking lot, where the third person, at Thrasher's instruction, delivered five one kilo bricks of marihuana to Emrod, who paid Thrasher $625.00 [R. T. 20, 30-32, 161]. At

that time, Thrasher asked Emrod when he was interested in doing business again.

Between June 7, 1966 and September 12, 1966, Thrasher and Agent Emrod had between six and twelve further telephone conversations, some of which Mr. Thrasher initiated [R. T. 35, 36, 95, 96]. In the first, Thrasher agreed to get more marihuana and said he would use new sources of supply [R. T. 38, 98, 125-127, 129]. The succeeding conversations dealt with the purchase from Thrasher of 50 kilograms of marihuana, which Thrasher had indicated he could obtain [R. T. 95-98]. In one of them, Thrasher implied that his source of supply received the marihuana from Mexico [R. T. 42].

Thrasher, from time to time, expressed apprehension about the risks involved in selling marihuana, and had occasions of greater and lesser willingness to deal. However, he never said he wasn't interested, but only that he was afraid of the risks involved. The dates of these expressions are not clear, but it is doubtful that they occurred earlier than May 4, 1966, since Thrasher was introduced to Emrod as soon as Thrasher mentioned that he wanted to sell one hundred kilos. They could have occurred between June 8, 1966, the date of the first sale, and September 12, 1966, when appellant was arrested [R. T. 23, 245-249, 255, 281-283].

On September 9, 1966 appellant Thrasher phoned Agent Emrod and offered to sell 30 kilograms at $125.00 each [R. T. 40, 111]. One hour later, Thrasher again phoned Emrod to confirm that Thrasher would be able to hold the marihuana out for sale through

September 12, 1966 [R. T. 41].

On September 12, 1966, in the evening, by pre-arrangement, Thrasher, accompanied by codefendants Getchel and Lange, met with Agents Emrod and Borquez [R. T. 43]. Thrasher asked whether Agent Emrod had the money to buy, since his two sources, Getchel and Lange, were going to have to go and get the marihuana [R. T. 44, 45]. After some conversation, Thrasher and the agents went to Thrasher's residence to make the sale [R. T. 49]. Thrasher asked to see the money [R. T. 112]. Co-defendant Getchel appeared and asked to see the money. When he was shown $3750, he left, and returned with co-defendant Lange, both carrying a large paper bag containing 30 one kilo bricks of marihuana. They asked what to do with it, and were instructed to, and did, dump it on the bed. All were then arrested [R. T. 19-20, 50, 51, 56, 57, 116-118, 137-140, 147-150]. At the time of the arrest, the marihuana involved in Count Six was located in Thrasher's apartment [R. T. 150-153, 21].

The marihuana delivered by Getchel and Lange was identified as Mexican in origin [R. T. 52-55, 102-108, 144-147]. No written order forms were presented or exchanged in either sale [R. T. 32-34, 55].

Appellant Thrasher and Lockett first met in the middle of March, 1966, by chance while both were walking in Hollywood [R. T. 239-240, 299-301]. They continued that first conversation over coffee at appellant Thrasher's apartment, probably at Thrasher's invitation [R. T. 299-300, 240]. Within a week or two thereafter,

Lockett was again a guest in appellant Thrasher's home, having called to visit [R. T. 241, 301].

Including the original meeting and through June 7 or 8, 1966, Lockett and appellant Thrasher may have had six conversations at appellant's home, which Lockett made a special effort to visit [R. T. 243-244, 303, 307-308]. Several of these conversations took place before May 4, 1966 [R. T. 246-249, 305]. During this same period appellant Thrasher began calling Lockett often on the telephone and he began visiting at Lockett's home [R. T. 243-246, 260-261].

Marihuana, LSD and hallucinogens generally, became a subject of conversation early in the acquaintance, perhaps at the second meeting in March. Appellant Thrasher raised the subject of selling LSD [R. T. 242-244, 301-303].

Sometime after Thrasher and Lockett first met, and before the May 4, 1966, meeting with Agent Emrod, Thrasher went to Mexico. While the testimony does not give the dates of this trip, those dates can be bracketed by reference to other events. When they met, Lockett lived in Hollywood [R. T. 239-240]. Lockett moved before Thrasher went to Mexico [R. T. 245-247]. When Thrasher returned from Mexico, he had a conversation in which he offered to sell one hundred kilos of marihuana [R. T. 245-249]. After he offered to sell the hundred kilos, he met Agent Emrod on May 4, 1966 [R. T. 249, 23].

Mexico then was the source of much marihuana that illegally entered the United States, and was the source from which came the

marihuana sold by appellant Thrasher in June and September, 1966 [R. T. 41-42, 52-55, 102-103, 105-108, 144-147]. After he returned from Mexico, appellant Thrasher introduced the possibility of marihuana sales, by telling Lockett that he, Thrasher, had a source and that he could sell one hundred kilos. Lockett replied that he knew a buyer, someone associated with a trucking company [R. T. 243, 245-249, 264, 277, 280, 281, 23; compare 303-306]. Lockett said he would make the introduction, but not become involved in the negotiations [R. T. 249, 251-252]. At Thrasher's request, Lockett arranged the May 4, 1966 meeting with Agent Emrod [R. T. 252].

I

THE JUDGMENT BELOW SHOULD BE SUSTAINED BECAUSE THE TRIAL COURT DID NOT FIND CREDIBLE EVIDENCE OF GOVERNMENT INDUCEMENT.

Five separate theories, each consistent with the judgment of conviction by the trial court as fact finder, sustain the judgment below, by eliminating entrapment at the threshold. Since findings of fact were waived by appellant, the judgment should be sustained if any view of the evidence favorable to the government will support the conviction. Masciale v. United States, 356 U. S. 386, 388 (1958); Cellino v. United States, 276 F. 2d 941, 943 (9th Cir. 1960) [C. T. 21]. On any one of these five views, no evidence exists of any inducement by the Government to appellant Thrasher to sell

marihuana.

The court has several times quoted with approval Judge Learned Hand's classic statement of entrapment:

> "[I]n such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it. United States v. Sherman, 200 F. 2d 880, 882-883 (2d Cir. 1952)."

Ortega v. United States, 348 F. 2d 874, 877 (9th Cir. 1965);

Notaro v. United States, 363 F. 2d 169, 174 (9th Cir. 1966).

That analysis remains basic, although its succinctness has subjected it to extrapolation and modification. In Lopez v. United States, 373 U. S. 427, 434, 435 (1963) the Supreme Court reaffirmed its line of decisions in Sherman v. United States, 356 U. S. 369 (1958), Masciale v. United States, 356 U. S. 386 (1958) and United States v. Sorrells, 287 U. S. 435 (1932) that, before the second element need be considered, it must be shown that the Government induced the defendant to commit the crime. It said:

> "The conduct with which the defense of entrapment is concerned is the manufacturing of crime by

> law enforcement officials and their agents. Such conduct, of course, is far different from the permissible strategems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged." (373 U.S. at pp. 434, 435)

While various cases cited herein have used inducement more or less broadly, e.g., Sherman v. United States, supra, in its technical sense the element has been construed as " . . . any solicitation or initiation". Kadis v. United States, 373 F.2d 370, 372, footnote 2 (1st Cir. 1967). While the First Circuit, in Kadis v. United States, supra, has now abandoned the L. Hand analysis, it seems to be the law in this Circuit. Notaro v. United States, supra.

First, the court, as judge of the credibility of the witnesses, could completely disregard the testimony of appellant's only witnesses, special employee Lockett, and Charlotte Ann Spragens, appellant's girlfriend. Masciale v. United States, supra. Notaro v. United States, 363 F.2d 169, 173 (9th Cir. 1966). On that view of the evidence, the facts before the Court, based on government witness Emrod's evidence would begin on May 4, 1966, with Emrod

telling Thrasher he wanted to buy 100 kilograms which he had heard Thrasher had for sale, and Thrasher agreeing to get it [R. T. 81, 25, 26]. The testimony of Agent Emrod regarding appellant Thrasher's relationship with Clay Lockett merely shows an introduction to Emrod [R. T. 78] on the date on which the Federal Bureau of Narcotics investigation began [R. T. 113] and, after May 4, 1966, some conversations between Emrod and Lockett in which they discussed, among other things, appellant Thrasher's progress in arranging a marihuana sale to Emrod [R. T. 88, 90-92].

The introduction by a special informant of an agent, posing as a buyer, to a rumored prospective seller of marihuana, who immediately acknowledges that he is able to supply one hundred kilos of marihuana, the use of the special informant by the prospective seller and the agent to contact each other, and the use of the special informant in keeping track of the proposed sale's progress, are not sufficient prima facie evidence to raise entrapment. Lopez v. United States, 373 U.S. 427, 435 (1963); Cellino v. United States, 276 F.2d 941, 947 (9th Cir. 1960); (alternate holding) cf. Notaro v. United States, 363 F.2d 169, 174, 175 f. 6 (9th Cir. 1963); Kadis v. United States, 373 F.2d 370, 372 f. 2 (1st Cir. 1967).

Second, the Court could accept the testimony of Clay Lockett, and disregard that by Charlotte Spragens. The evidence then shows that appellant Thrasher, a marihuana user, first raised the general topic of hallucinogens and marihuana, and first broached to Lockett the subject of making a hundred kilo marihuana sale [R. T. 244, 277, 249]. The initiative for the sales was from appellant Thrasher,

and negates any inducement. Without inducement, there is no entrapment. Lopez v. United States, supra; Sherman v. United States, supra. Compare: Kadis v. United States, supra.

Third, the Court could have accepted only the Spragens testimony. On this evidence, the subject of psychedelics arose in March, 1966 at the second meeting between the appellant Thrasher and Lockett. Thrasher

> ". . . said something about the economics of LSD and [Lockett] said that he didn't know anyone that was interested in LSD, but that he did know a man that wanted to buy large quantities of marihuana . . . Mr. Thrasher said that he wasn't interested in selling any marihuana, that there was no profit in it, and that it was too risky, and that the several years that he had been around people that smoked marihuana, that he had never seen anyone make any money." [R. T. 301, 302] (emphasis added)

Lockett offered Thrasher, who was a marihuana user, marihuana for personal use [R. T. 306]. Three or four visits later, shortly before May 4, 1966, Lockett brought the subject up and said that he knew a ". . . fellow that would be interesting in purchasing large amounts . . . a hundred kilos . . . [at] . . . a hundred and twenty five a kilo . . ." [R. T. 305-308, 23].

On this evidence the Court could have found no inducement, and have concluded that appellant Thrasher initiated the discussion

of illegal sales of LSD, that he was considering selling, or was selling LSD, that he had considered, or was considering, marihuana sales, and that his only objections to selling marihuana were " . . . the natural hesitancy of one acquainted with the narcotics trade", and the lack of profit. Sherman v. United States, supra, at p. 371.

Fourth, the Court could have accepted Spragens' testimony, and the uncontradicted portions of Lockett's testimony. This view gives evidence from which to conclude that, at the second meeting between them, Thrasher discussed selling LSD, but did not consider marihuana financially attrative enough. However, he did go to Mexico to investigate the sources, prices and prospects of a hundred kilo sale at $125.00 per kilo, or a total price of $12,500.00 [R. T. 245-247, 301-306]. Upon his return and further consideration he found the hundred kilo sale attractive enough to pursue [R. T. 252].

On this evidence, showing all the initiative regarding illegal sales from appellant Thrasher, and despite his initial hesitancy, he cannot prevail, as the Court could easily find no inducement. United States v. Whiting, 321 F. 2d 72, 76 (1st Cir. 1963); Toy v. United States, 273 F. 2d 625, 626 (2nd Cir. 1960).

Finally, the Court could have found that the Government was not responsible for any blameworthy conduct, if there was any, by Clay Lockett. In Ortega v. United States, 348 F. 2d 874 (9th Cir. 1965) this Court affirmed a judgment of conviction arising from two heroin sales. The defendant claimed a "frame up" and testified that he had been asked by the informer to participate in a charade sale of heroin to the informer, so that the informer, having pretended to

make a purchase, could sell to a third person. The third person in fact was a Federal Bureau of Narcotics Agent [348 F. 2d 874, at 877, 878, 877 f. 2]. The defendant testified that he had agreed to go along with the charade, and had accepted money for the heroin, but that he never possessed the heroin, which remained with the informer [348 F. 2d at pp. 876, 878]. The informer, contradicting his signed statement, also testified to these facts. Affirming the conviction and the denial of a requested entrapment instruction [348 F. 2d at p. 875, f. 1], this Court said:

> "This, then, is not a case where any government agent asked Strickland to perform the alleged treacherous 'charade'. Neither Celaya nor any other government agent had the slightest knowledge that Strickland proposed to 'frame' Ortega, if in fact he did." [348 F. 2d at p. 878]

And,

> " . . . Here there is not the slightest indication the police wanted, or knew, that Strickland would do what he now asserts he did -- impose upon Ortega. Not until Strickland contradicted his original signed statement in the courtroom was there any knowledge in the government agents as to what Ortega and Strickland now assert Strickland did. . . ." [348 F. 2d at p. 879]

The phony buyer in each sale was a Federal Bureau of Narcotics agent, who was present during some of the informer's dealings with defendant.

This holding, that, if the evidence fails to show that the official federal agent, as distinguished from the special employee or informer, neither knows nor should know, that the special employee has framed the defendant, then the conduct of the special employee may not be considered as conduct of the government on the defense of entrapment, is applicable in this case. Of course, it is true that the government cannot remain wilfully ignorant of the special informer's flagrant conduct, to avoid the defense of entrapment. Sherman v. United States, 356 U.S. 369, 373-375 (1958).

Lockett, who was on probation for a tax offense of an unspecified nature, contacted the Federal Bureau of Narcotics, in the Fall of 1965 or the Spring of 1966 regarding some marihuana sales [R. T. 80, 285-289]. Although he received some money from the Federal Bureau of Narcotics for his work as a special employee, he had not been paid anything at the time he reported appellant Thrasher, nor did he know how much he would receive and could fairly be considered an occasional employee through this period before May 4, 1966. He was supporting himself through other work [R. T. 237-239, 270-273, 276].

The official investigation of appellant Thrasher began about May 4, 1966, when the Federal Bureau of Narcotics agents first learned of appellant Thrasher [R. T. 80-81, 113]. This was after Thrasher and Lockett began discussing marihuana sales at Thrasher's initiative. Lockett's instructions were to see if Thrasher, and presumably others, were interested in selling, and, to keep in touch with Agent Emrod regarding his activities [R. T. 256, 260]. After

the investigation began, in addition to dealing directly with appellant Thrasher, Emrod kept in touch with the Lockett-Thrasher relationship, by talking to Lockett about it [R. T. 88, 90-92, 255-256].

The evidence clearly supports implied findings that the government did not know of any persuasion by Lockett, that it instructed him against such conduct, and that it did not keep itself deliberately ignorant of, but kept informed of, Lockett's relationship to Thrasher. On the authority of Ortega, supra, and Sherman, supra, the trial court could fairly conclude that the government had in good faith fully complied with its responsibility of supervision and was not responsible for blameworthy conduct, if any, by Lockett.

Each of these views of the evidence remove the issue of entrapment from the case, by dispensing with any evidence of government initiative and inducement. Any one is a view which the court below, as fact finder, could have taken. Any one is sufficient to sustain the judgment below, without considering the relative conduct of the appellant and the government, and, so, the judgment should be affirmed.

II

THRASHER'S PREDISPOSITION AND WILLINGNESS TO SELL MARIHUANA, AND THE ABSENCE OF OBJECTIONABLE LAW ENFORCEMENT ACTIVITY, AMPLY APPEAR IN EVIDENCE.

Appellant Thrasher's willingness to deal in marihuana without any great urging by Lockett or anyone else amply appears in the evidence. And the trial court's finding that no entrapment exists is supported both by an evaluation of the evidence using the existing legal standards and by a comparison of the evidence with the decisions of the Ninth Circuit and of the Supreme Court.

Where the examination proceeds from inducement to the second element of entrapment, the Supreme Court has said:

> "To determine whether entrapment has been established, a line must be drawn between the trip for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence. See 287 U.S., at 451."

Sherman v. United States, supra, at pp. 372, 373.

The effort in appellant's opening brief, at pp. 6-12, to draw away

from this dual examination, by relying on the concurring opinion in Sherman v. United States, supra, on United States v. Sagansky, 358 F. 2d 195 (1st Cir. 1966), and on United States v. Morrison, 340 F. 2d 1003, 1004 (2nd Cir. 1965) cannot change the issues before this Court in this case. The examination of the defendant's predisposition and willingness is firmly settled, and these cases do not support appellant. We especially disagree with appellant's effort, in his brief, at p. 12, lines 9-24, to present the entrapment standard as one which requires the major, if not the nearly exclusive, focus on the government's conduct. The quotation, from United States v. Morrison, supra, which appears in appellant's brief at p. 12, lines 18-23, and which is in fact a paraphrase, omits the word "alternatively". "Alternatively" appears in the opinion itself between "to inquire" and "whether", and when added makes clear that, while the entrapment inquiry has expanded to include an evaluation of the government's conduct, nevertheless the major attention remains focused on the defendant's willingness.

The Supreme Court has said:

> "The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions. See Sorrells v. United States, 287 U.S. 435, 77 L.ed. 413, 53 S.Ct. 210, 86 A.L.R. 249; Sherman v. United States, 356 U.S. 369, 2 L.ed. 2d 848, 78 S.Ct. 819, Masciale v. United States, 356 U.S. 386, 2 L.ed. 2d 859, 78 S.Ct. 827. Whether in the

> absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been mooted."
>
> Lopez v. United States, 373 U.S. 427, 434 (1963)

Thrasher's predisposition and willingness to sell marihuana are manifest throughout this case. He raised the subject of hallucinogens at his second meeting with Lockett [R.T. 242-244]. On his own evidence, he brought up the question of selling LSD [R.T. 301-303]. On his own version of the facts, he had no objection to selling marihuana because it was illegal as such, but because ". . . there was no profit in it, and that it was too risky. . . ." [R.T. 302]. Lockett did not, as suggested in appellant's opening brief, at p. 3, lines 16-19, p. 6, lines 11-13, p. 7, lines 18-20, first ask Thrasher whether he would be interested in selling marihuana and, of course, Thrasher did not refuse. That fact, if the evidence is in conflict, was resolved at the trial level, and cannot be reargued here.

After Thrasher returned from Mexico, from which comes much of the illegally imported marihuana in the United States, he introduced the subject of a hundred kilo sale, raising the possibility he had located a large supplier of marihuana [R.T. 41-42, 52-55, 102-103, 105-108, 144-147, 243, 245-249, 264, 277, 280, 281]. Even on Thrasher's own evidence, Lockett's solicitation essentially

consisted of a reply, on one occasion, that Lockett knew someone willing to buy large quantities of marihuana, and on a second occasion, a repetition of that statement [R. T. 301-306]. Thrasher asked to, and did, meet a buyer at Thrasher's apartment to discuss a hundred kilo sale [R. T. 25-26, 80-82, 84, 252]. After this, he showed substantial initiative in keeping his buyer interested; first by placing four of the six direct telephone calls between them regarding the deal, and, when he had trouble producing the hundred kilos, by producing and soliciting lesser quantities [R. T. 26-27, 29, 85-87].

Thrasher's poor financial condition was probably the basis for several problems he encountered in selling marihuana, but it demonstrates his persistence [R. T. 257-259, 266-268]. It, rather than his conversations with Lockett, was probably the motive for his willingness to deal in marihuana, despite the risks he recognized [R. T. 281-282]. It, rather than a lack of supply, was probably the reason he had a "hassle" and couldn't easily produce the hundred kilo quantity [R. T. 252-254]. And, despite appellant's inference, in his brief at p. 3, lines 15-20, that, because of the "hassle", Thrasher lost all interest in selling marihuana, the evidence is clear that Thrasher's "hassle" was only with the size of the deal, and not with selling marihuana [R. T. 252-254, 281-283].

His financial problems may also account for the method of sale and delivery he used. He appears to have acted as a middleman, negotiating with the buyer, and bringing the buyer together with the persons who actually had the marihuana [R. T. 30-32, 44-

45, 49-51, 56-57, 116-118, 137-140, 147-150]. Even though his lack of funds made the problems of selling substantial, he overcame them.

Thrasher's familiarity with, and interest in, selling marihuana is apparent. He was a user of marihuana, and able to procure it in quantities for his personal use [R. T. 258, 262-263, 283-284, 290, 308-311]. Appellant's effort, at pp. 9-10 of his brief, to distinguish between his personal use of marihuana, and selling it, and to minimize the significance of using, must be subjected to some question. On the evidence in this case, and with respect only to the marihuana involved for his personal use, several federal violations appear. These include receiving this marihuana from others, either with or without payment, the transportation and concealment of such marihuana, and the facilitation of the transportation of such marihuana. See 21 U.S.C. §176a. The relatively small quantities involved is no defense. Notaro v. United States, supra (involving the sale of 3-1/2 oz. of marihuana).

Either this use, earlier investigation of marihuana selling, or previous marihuana selling, was the source for the background knowledge Thrasher possessed when he met Lockett, and his subsequent ability to deal [R. T. 301-302]. He located a possible hundred kilo supply, and a specific marihuana source [R. T. 25-26, 80-82, 84]. At his first sale, he solicited further sales [R. T. 25-26, 80-82, 84]. Although he expressed anxiety about the risks of apprehension to Lockett, he never mentioned this to his buyer, Emrod [R. T. 281-282].

Thrasher's statements that he was uninterested in dealing at a particular time were not made until after May 4, 1966, when he was already well along in his efforts to sell marihuana. They could have been made between June 8, 1966 and September 9, 1966. [See appellee's statement of the case for this analysis and R. T. citations.] However, these statements are no evidence that he was unwilling to deal, until persuaded by Lockett's special effort, because Lockett's effort took place soon after they met, was completed by June 8, 1966, and had to be substantially completed by May 4, 1966. [See appellee's statement of the case for this analysis and R. T. citations.] The special efforts, in any event, was never shown to be anything more than to visit Thrasher at Thrasher's home [R. T. 243, 244]. These statements, most charitably, can be described as "second thoughts".

Lockett never told Emrod he would not sell. Instead he sold five kilos and offered to get 50 kilos more. He had between six and twelve conversations with Emrod about the 50 kilo sale, and placed several of those calls himself [R. T. 35-36, 95-98]. When his first source of supply, Mittleman, was no longer available, he found new sources [R. T. 38, 98, 125-129]. Despite his occasionally expressed doubts, it is clear that " . . . he was ready and willing to commit the offense whenever the opportunity was offered. . . . " Notaro v. United States, supra, at p. 175.

In Hill v. United States, 261 F. 2d 483 (9th Cir. 1958), this Court rejected a claim of entrapment as a matter of law on evidence quite similar to this. The Court said:

"This point is based upon the contention that the Federal Agents, acting under false names and identities, practiced fraud and deceit on the appellant, worked on appellant two months as a prospective partner in order to get evidence on a known narcotics peddler; they focused on appellant as a narcotics peddler without any evidence that the appellant knew anything about the subject; and they furnished him money with which to purchase marihuana.

"Other evidence in the record, however, is that it was the appellant who first mentioned narcotics to the Federal Agents; that appellant informed them that he had at least three sources of supply and could deal in 100 to 200 pound lots; that appellant volunteered to the Federal Agents the information that a bar was for sale and that the owner thereof still had narcotics for sale; and it was the appellant who invited the Federal Agents to come to appellant's place of employment to discuss the possibilities of further narcotic traffic; and it was the appellant who arranged for the purchase of the narcotics. The record before us does not show, as a matter of law, that appellant would not have committed the offenses for which he was found guilty except for the trickery, persuasion or fraud of the government agents. . . . " 261 F. 2d at p. 488.

On the other hand, when we examine the government's role, the record contains no evidence that these two sales were the produce of "creative activity" by the government or its agents. The standard by which this behavior is to be evaluated is well put in Sherman v. United States, supra:

> ". . . The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. . . . " 356 U.S. at p. 372.

And, again:

> ". . . the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials. (Emphasis supplied.)" 356 U.S. at p. 372.

Appellant and Lockett met, and both made efforts to develop a friendship. What course that friendship would have taken, if Thrasher had not shown an interest in selling marihuana, or if Lockett had not been an occasional special employee, is idle speculation.

Thrasher suggested he could, and would sell, and Lockett replied he knew someone who would buy. Thrasher, however, would have to deal, and would only receive an introduction to the buyer. Thrasher agreed, and at his request, the May 4, 1966, Thrasher-Emrod meeting was arranged and Lockett introduced them [R.T. 243, 245-249, 251-252, 264, 277, 280-281]. Lockett was not involved in the conversation where Agent Emrod, posing as a buyer, discussed the hundred kilo sale [R.T. 25-26, 80-84]. Lockett gave Emrod his telephone number, so that they could remain in contact about the sale [R.T. 87].

Emrod continued posing as an interested buyer from May 4, 1966 through September 12, 1966 [R.T. 26-27, 35-38, 95-98, 125-127, 129]. Lockett did not pay excessive attention to Thrasher, but remained in contact; both he and Thrasher initiated further meetings and conversations [R.T. 259-261, 263]. Lockett did not "push" the subject of marihuana sales. Thrasher did [R.T. 91-92, 255, 264-266, 282-283]. Lockett was instructed to and waited for Thrasher to take the initiative. Although he relayed messages between Thrasher and Emrod, he never asked Thrasher to sell marihuana [R.T. 255, 263-266, 282-283]. This evidence is not " . . . the manufacturing of crime by law enforcement officials . . . "; rather, it is an example of " . . . the permissible stratagems involved in the detection and prevention of crime. . . . " Lopez v. United States, supra, at p. 434.

The use of special employees and government agents posing as go-betweens is clearly permissible. Masciale v. United

States, supra.

The government, in order to justify its investigation does not need to show any prior suspicion that Thrasher was involved. United States v. Campbell, 235 F. Supp. 190 (E. D. N. Y. 1964) cited and quoted by appellant at p. 7 of his brief for this proposition, does not require such a showing. Despite the assertion in appellant's brief, at p. 11 and p. 13, that the government should be limited to using informants to catch "those apparently established as dealers", that is not the law in this or most other circuits. Silva v. United States, 212 F. 2d 422, 424 (9th Cir. 1954); Kadis v. United States, 373 F. 2d 370, 373 (1st Cir. 1967). The quotation from Campbell, supra, which in fact is a paraphrase from two separated portions of the opinion, on pages 190 and 191, respectively, actually supports a holding that the evidence as a whole justified a finding of entrapment in that case. Whether or not Thrasher was, or the government knew he was, dealing in marihuana, is beside the point, since "there is always a first time wilfully to engage in criminal conduct." Silva v. United States, 212 F. 2d 422, 424 (9th Cir. 1954).

Entrapment as a matter of law is also negated by comparing this set of facts with those in the reported Supreme Court decisions.

In Sherman v. United States, 356 U. S. 369, 373 (1956), the Supreme Court held that entrapment existed as a matter of law. In contrast to this case, no questions of credibility existed, on appeal, since the Court referred only to the government's evidence. (356 U. S. at p. 373). There the evidence showed that K, the

informer, met Sherman at a doctor's office where both were being treated for narcotics addiction. K admitted to many discussions, including, among other topics, their individual problems involving narcotics addiction. After many such meetings, K asked for help in obtaining narcotics. K had to make many requests and appeal to sympathy for K's suffering, before Sherman consented to find narcotics for him. Even then, Sherman apparently transferred them to K at cost plus expenses. (356 U.S. at p. 371).

But, in our case, the evidence is much different. No appeal to sympathy exists. No request is made for appellant to sell, but only after appellant says he can and will sell, is an offer made to introduce him to a buyer. (Even on Thrasher's rejected version of the evidence, the alleged persuasion consists only of two statements by Lockett that he knew a buyer, made early in their relationship, when Lockett and Thrasher were comparative strangers.) When Thrasher volunteered his interest in selling, he was introduced to official government agents who posed as buyers. Thrasher was selling on his own initiative for his own profit; he aggressively pursued his customers. This case does not fall within the ambit of Sherman v. United States, supra.

A comparison with United States v. Sorrells, 287 U.S. 435 (1932), does not help appellant. See appellant's brief, pp. 9-10. Sorrells ultimately held that on its evidence entrapment was a question of fact for the jury. (287 U.S. at p. 452). Thus, even if similar facts existed in our case, on this authority, this Court should affirm the trial court. Sorrells is a useful example because

the evidence, while presenting some credibility questions, was not in substantial dispute regarding the conduct of the agent and the defendant. The facts thus provide one example of conduct by a government agent which does not necessarily constitute entrapment. The agent was introduced by friends of defendant at defendant's home. The agent spent an hour and a half with defendant, reminiscing about their World War I experience in the same division. Others were present. The agent made three, four or five requests for some whiskey, and was the only person to do so. He may have said he wanted to use it as a gift. When defendant finally agreed to get the whiskey, and got it, he was arrested. (287 U.S. at pp. 439-441).

These facts are no closer to our own than those in Sherman v. United States, supra. In our case we have strangers making a chance acquaintance, rather than the introduction by mutual friends. We have the initial invitation by Thrasher for Lockett to come over for coffee. We have Thrasher raising the subject of selling LSD in a conversation about hallucinogens, LSD and marihuana. We have Thrasher suggesting he can sell and deliver one hundred kilos. There is little similarity between Sorrels persuasion and Lockett's initiative.

Masciale v. United States, 356 U.S. 386 (1958), decided the same day as Sherman v. United States, supra, rejected a claim that, as a matter of law, entrapment was established. The testimony of the agent Marshall, that he met with petitioner as a narcotics buyer, as a result of an informant's introduction, that

they discussed narcotic purchases, that they had ten conversations over the next six weeks, because petitioner was having trouble making his contact, and that petitioner finally did set up a sale, is similar to the evidence in our case. Dissenting on another ground, four Justices, including three still on the Court, characterized this evidence of entrapment, including petitioner's contradicting testimony of a campaign by the informer ". . . to persuade him to sell narcotics using the lure of easy income." as "rather thin" (356 U.S. at pp. 388, 389). On this authority, too, the decision below must be sustained for the evidence here is similarly thin.

Lopez v. United States, 373 U.S. 427, 436 (1963), in which the Court said that the evidence did not fairly present the issue of entrapment, is analogous to this case. In Lopez, at a first meeting, the defendant gave unsolicited bribes to an IRS investigator who was on official business. At a subsequent meeting, when the subject of the delinquent returns came up, the defendant again offered bribes. (373 U.S. at pp. 430-431). The agent, who had returned for the next meeting, after reporting the initial bribes, was cooperating with law enforcement officials, and was under instructions to go along and try and draw the conversation back to the initial meeting. (373 U.S. at p. 430). The only counts on which defendant was convicted arose from the second meeting. (373 U.S. at pp. 432, 434). Regarding entrapment, the Court said, "Indeed, the paucity of the showing might well have justified a refusal to instruct the jury at all on entrapment." (373 U.S. at p. 436).

In this case, too, the essential evidence is that Thrasher first raised the subject of selling LSD, first raised the subject of selling marihuana, accepted an offer to meet a buyer, and pursued the sales with vigor and industry, despite problems in locating sources, and despite his financial problems. Lockett was instructed to, and all he did was, play along, as did Emrod, until Thrasher had marihuana to deliver. It almost seems that, as a matter of law, no entrapment was shown.

Walker v. United States, 298 F. 2d 217 (9th Cir. 1962), resembles this aspect of this case in many respects, since it shows how intricately law enforcement officials may become involved in a defendant's scheme to smuggle narcotics, without creating an entrapment. In that case, this Court affirmed the convictions below, and it should do so here.

CONCLUSION

No government inducement is shown if any one of five possible views of the evidence, each favorable to the government, is accepted on this appeal. Even if the Court finds government inducement, an evaluation of the conduct of the defendant and the government shows substantial evidence to justify the trial court's conclusion that no entrapment occurred.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

THEODORE E. ORLISS,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Theodore E. Orliss

THEODORE E. ORLISS